

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

IN RE)	
)	NO. 3-83-00372
SOUTHERN INDUSTRIAL BANKING)	
CORPORATION)	
)	Chapter 11
Debtor)	
<hr style="border: 0.5px solid black; margin: 10px 0;"/>		
THOMAS E. DuVOISIN, Liquidating)	
Trustee)	
)	
Plaintiff)	
)	
v.)	ADV. NO. 3-85-0524
)	
PETER A. NESKAUG)	
and MARTHA NESKAUG)	
)	
Defendants)	

M E M O R A N D U M

This adversary proceeding is before the court upon a motion by defendant Peter A. Neskaug to vacate a summary judgment that was entered against him on March 29, 1993. The plaintiff has filed a response opposing the motion.

Summary judgment was entered against defendant Peter Neskaug based upon findings that (1) on February 11, 1983, SIBC issued a check to Peter A. Neskaug in the amount of \$40,764.24 to close a VIP account opened at SIBC in the names of "Peter A. Neskaug or Martha Neskaug"; (2) the check was honored by SIBC's bank on February 14, 1983, during the "run period" on SIBC; and (3) the endorsement on the back of the check is the signature of "Peter

Neskaug." Because the defendant raised the ordinary course of business defense under § 547(c)(2) in his answer, the principal issue for decision in ruling on the plaintiff's motion for summary judgment was whether the transfer to the defendant took place on February 11, 1983, when the check was delivered to the defendant, or on February 14, 1983, when the check was honored by SIBC's bank. Previously, the court had held that transfers during the "run period" on SIBC which began on February 14, 1983, were not transfers within the ordinary course of business of SIBC. *DuVoisin v. Anderson (In re Southern Indus. Banking Corp.)*, 92 B.R. 297 (Bankr. E.D. Tenn. 1988).

Relying upon the rationale of *Barnhill v. Johnson*, 112 S. Ct. 1386 (1992), and certain dicta in *In re Belknap*, 909 F.2d 880 (6th Cir. 1990), the plaintiff argued, and the court agreed, that a transfer for purposes of applying § 547(c)(2) occurred on the date a check was honored, not on the date a check was presented. Consequently, the court concluded the preferential transfer to defendant Peter Neskaug occurred on February 14, 1983, during the "run period" on SIBC, thus precluding the defendant from relying on the ordinary course of business defense. See *DuVoisin v. Anderson (In re Southern Indus. Banking Corp.)*, 92 B.R. 297 (Bankr. E.D. Tenn. 1988).

Subsequent to the entry of summary judgment against defendant Peter Neskaug, the Sixth Circuit Court of Appeals ruled that a transfer for purposes of a § 547(c) defense occurs on the date a

check is delivered, a ruling contrary to the previous ruling in this case. *Still v. Fruehauf Corp.*, No. 92-5848 (6th Cir. July 13, 1993). Defendant Peter Neskaug now seeks an order vacating the entry of summary judgment against him.

The plaintiff opposes the defendant's motion on two grounds. First, the plaintiff argues that because the defendant did not respond to his motion for summary judgment, the defendant waived his right to object to a summary judgment and cannot now seek to set it aside. Second, the plaintiff argues the defendant is not entitled to set aside the summary judgment under the provisions of Rule 60(b) of the Federal Rules of Civil Procedure, assuming the defendant is relying upon this rule for relief.

Rule 56(e) of the Federal Rules of Civil Procedure provides in part as follows:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, *if appropriate*, shall be entered against the adverse party. (Emphasis added).

At the time the court entered summary judgment against the defendant, the court believed it was appropriate to do so based upon its perception of the law at that time. In light of the

recent Sixth Circuit opinion, however, the court now believes it erred in granting summary judgment.

Although the plaintiff argues defendant Peter Neskaug cannot set aside the summary judgment entered against him using the provisions of Rule 60(b), that rule is not applicable here. Rule 60(b) pertains to final judgments. Because there is another defendant in this case who has not had a judgment entered against her, the summary judgment entered in this case is subject to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. That rule provides in pertinent part as follows:

When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The court did not direct that the summary judgment entered against defendant Peter Neskaug be a final judgment. Hence, at this stage of the proceeding it is still subject to revision.

Summary judgment should be granted only in those cases in which the moving party is entitled to judgment as a matter of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Fitzke v. Shappell*, 468 F.2d 1072 (6th Cir. 1972); *St. John v. New Amsterdam Casualty Co.*, 357 F.2d 327 (5th Cir. 1966); *In re Curtis*, 38 B.R. 364 (Bankr. N.D. Okla. 1983). The fact an opposing party fails to respond to the motion does not diminish the movant's burden to establish its entitlement to the entry of summary judgment. *In re Curtis*, 38 B.R. at 364; 6 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 56.22[2] (2d ed. 1988). Even a failure by the opposing party's counsel to appear at the hearing on the motion for summary judgment does not justify entry of a summary judgment where it is not sustainable on the merits. *St. John v. New Amsterdam Casualty Co.*, 357 F.2d at 328-29.

Here the opposing party failed both to respond to the plaintiff's motion for summary judgment and to appear at the hearing on the motion. Nevertheless, this failure, in and of itself, was not the reason summary judgment was granted, nor could it have been. Rather, summary judgment was previously granted on the merits based upon the court's perception of the law at that time. Now that the pertinent law has been clarified, the court cannot refuse to reconsider its holding simply because the opposing party failed to respond to the earlier motion. To do so would mean that the summary judgment against Peter Neskaug would stand in this case solely because the defendant previously failed to respond to the motion

for summary judgment, a circumstance that will not support entry of summary judgment. Since the court is now of the opinion that summary judgment should not have been entered in this case against defendant Peter Neskaug, the judgment will be set aside and this case will proceed on its merits.

An appropriate order will enter.

JOHN C. COOK
United States Bankruptcy Judge